(3)

NO. 89-1708

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES T. KOUNO,

PETITIONER,

V.

OREGON STATE BOARD OF HIGHER EDUCATION; KENNETH L. BEALS; COURTLAND L. SMITH; LYLE D. CALVIN; JOHN V. BYRNE; TOM E. GRIGSBY; LLOYD E. CRISP,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Reply to Brief in Opposition

Under Supreme Court Rule 15.6, Kouno rebuts the respondent new argument on the reviewability of this case, and their new arguments on the importance of the review. Kouno rebuts also their premature arguments on the merits.

REVIEWABILITY

Timeliness of Appeal from Judgment (Br. in Opp., 6-7, foot note).

The respondents invite the Court to find a procedural error on Kouno's part.

Rebuttal: (1) The makers of the judicial rules do not, for any occasion, provide, or did not, at least, in F.R.C.P. 52(a) provide, that the litigants may not question to the federal district court its judgment, in its very first instance, since their providing such would be to elevate the district court to an unreasonable intellectual paragonhood and autocracy. F.R.C.P. 52(a) says only that, in

cases of certain species of judgment on motion, the court need not necessarily, or automatically, issue the findings of fact and the conclusions of law, as there may clearly be no call for them. The rule does not peculiarly in said cases penalize the litigant for desiring them, or, where the court has issued them under this rule, as in this case, for requesting their vacation, revision or clarification. United States v. Dieter, 429 U.S. 6 (1976); Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).

Also, for reasons evident below, F.R.C.P. 41 (b) applied.

The Opinion and the Judgement of the district court were entered 06/10/1988. The motion of Kouno requesting the court their vacation, revision or clarification was filed 06/23/1988. This motion, characterized by the court as a Rule 60(b) motion, qualified in its content as a Rule

52(b), a Rule 59(b) and a Rule 59(e) motion. Under F.R.C.P. 52(b), 59(b), 59(e) and 6(a), this motion was timely as any of these motions. Therefore, under F.R.A.P. 4(a)(4), it tolled the time to appeal from the judgment. Accordingly, the appeals court took jurisdiction over the judgment, and affirmed it, through a proceeding which "[t]erminated on the Merits" (appeals court docket entry, 11/15/89). Thus, the presence of this ruling of the appeals court, now before this Court is legitimate and final.

(2) Even if the motion were a rule 60(b) motion, the judgment would be for this Court's review, as follows.

As the petition presents, there militate against the Opinion and the judgment points of fact and those of law, which are, or, at least, conceivably by Kouno and the public are, plainly decisive in Kouno's favor, and not ever to be ignored

or overlooked by the court. Therefore, under F.R.C.P. 60(b)(6), relief from the operation of the judgment for any reason justifying the relief, and F.R.C.P. 60(b)(1), mistake, inadvertence, surprise, or excusable neglect, Kouno is entitled to a reversal of the rulings below and a resolution of his bewilderment, or, under the latter provision, in any case, to statements of this Court resolving his bewilderment.

IMPORTANCE

(1) State statutes (Br. in Opp., 1-4, 8).

The respondents argue that Oregon statutory provisions make the OSU teacher a "state employee," i.e., a state agent and/or ward, in the substance (i.e., the essence, rather than mere incidents) of his academic conduct with his student.

Rebuttal: Oregon statutory provisions are presently not pertinent. The question of the capacity or privilege of

the teacher is not a question of the state's intention to confer upon him the state-agentship or state-wardship, but, as below, a question of its intention in conferring it, of its power to confer it, of the teacher's intention in accepting it, and of his power to accept it.

The Oregon statutory provisions cited by the respondents give no support to them. Rather, O.R.S. 351.072(1)(a) (Br. in Opp., 2-3), in effect, acknowledges the opposite of their contention.

Kouno is suing the Board merely to obtain thereby replacement defendants from the Board, for the purpose of injunctive reliefs from OSU, in cases of departure of the defendant teachers from their OSU office. To any extent that the Board is a state agency in this context, it is merely a symbol. To any extent that the Board's role is substantial in this context, it is a corporation independent from the state.

(2) 'Pennhurst' (Br. in Opp., 11-12).

The respondents contend that, although the courts below offered as a basis for their ruling, that the statutory state indemnification, in itself, is sufficient to make Kouno's suit one against the state, (1) they did not therein appeal to any authority, and, since (2) they did not base their ruling solely on this theory, as (according to the respondents) Kouno said they did (Pet. Cert., 35-36), (3) even if they erred in resorting to this theory, and even if they appealed therein to authorities from this Court, the error and the appeal would be inconsequential.

The district court, and the affirming appeals court, raised as a ground for their ruling state indemnification under O.R.S. 30.285(1) (Pet Cert., 52), not common law state indemnification which might have been postulable purely on the basis of the substance of the relationship

between the state and the defendant teachers. Thus, the courts said that the statutory state indemnification, in itself, i.e., without regard to the substance of the relationship between the state and the teachers, made Kouno's suit one against the state. The respondents admit that the courts thus opined, and attempt to supply an excuse. The opinion of the courts is untenable, as the respondents admit.

Rebuttals: (1) Indeed, the courts do not attribute their inspiration for their indicated fallacy to any authority. But, they maintain that the fallacy is accommodated by Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), Edelman v. Jordan, 415 U.S. 651 (1974), and Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984). To this extent the courts appeal in said fallacy of theirs to these authorities. Also, in allowing themselves to be, to said extent, parties to the

fallacy, these authorities fail.

(2) Kouno did not contend that the courts based their ruling solely on the statutory state indemnification.

(3) Said fallacy of the courts below, their appeal therein to said authorities from this Court, and said failure of the authorities, are not inconsequential, since the other ground, seeming, of the courts below for their ruling, i.e., the teachers' drawing stipend through the Board, is not good.

(3) The 'Conley' Rule (Br. in Opp., 12).

The respondents appear to contend thus (authorities?): In its dismissing of Kouno's action, the district court applied to its deliberation the rule of Conley v. Gibson, 355 U.S. 41, at 45-46 (1957): "[Dismiss only if] it appears beyond doubt that the plaintiff can prove no set of facts...entitl[ing] him to relief." This rule was the appropriate standard. The

court's error, if any, which would be merely incidental to the court's proper judicial exertion under this rule, would not be reversible.

Rebuttal: Kouno is sueing the teachers as teachers acting in academic freedom, for the substance of their academic conduct with Kouno. The courts below ruled that the teachers are, in this context, state agents and/or wards, as a matter purely of the authority of laws.

The capacity or privilege of the teachers is not a matter of the authority of laws. It would not even be a matter of law, except with a basis in facts in the substance of the relationships among the state, the teachers and Kouno. The courts below refused to consider these facts. Also, while thus acting, the courts had, as below, occultly admitted that the teachers had acted with Kouno as categorically independent and private parties; and

postulated that the teachers, as such parties, were immune from Kouno's claims. These behaviors of the courts, Kouno said, do not qualify as proper judicial exertions under Conley (Pet. Cert., 35).

(4) The Findings (Br. in Opp., 13).

The respondents contend the following: (1) The district court said only that the teachers said that Kouno's academic performance was inadequate, and that their deciding of such questions is a part of their academic conduct. (2) The arbitrariness of the finding re the thesis committee is immaterial.

Rebuttal: Kouno's rights with the teachers on academic contract with them are, as below, 14th Amendment rights. The teachers deprived these rights of Kouno, as below, as a matter purely of their categorically personal academic-professional rights, not the state's rights; under color purely of their categorically

personal scholarly authority, not any public law; purely on their categorically personal academic-professional discretion, not pursuant to any public law, i.e., not through any process of law, let alone due proces of law. Therefore, there is no official immunity for the teachers against Kouno's claims on these rights, even if they acted 'as state agents.' Indeed, they are especially liable personally, if they so acted. Thus, to avail the teachers the 11th Amendment immunity, the court had to negate these claims. Therefore the court asserted, negating Kouno's claims most distinctly such claims, "[Kouno] did not make adequate academic progress" (Pet. Cert., at 49), that the committee rejected Kouno's thesis effort and terminated him from the academic degree program (at 50), and that the allegation of the teachers was permissibly in them personally a part of the substance of their academic conduct

with Kouno (at 55).

Thus, as described in the petition (25-26, 37-40), the court made the arbitrary findings, deliberately, crucially to the judgment.

MERITS

Academic Freedom (Br. in Opp., 10-11).

The respondents state:

> [Kouno] appears to reason that, if the state and the judiciary may not impinge upon certain areas of academic freedom, an academician must act solely as an individual within those areas and not as an agent of the state...
>
> Academic freedom is not the freedom to be sued; and although state control of state universities is subject to constitutional limitations, nonetheless "'by and large, public education in our Nation is committed to the control of state and local authorities,' Epperson v. Arkansas,

[supra]," Board of Curators, Univ. of Mo. v. Horowitz, supra.

Rebuttal: Governments have certain authority dominant over the authority of individual citizens, in civism, and in education in civism ("civic education"), e.g., aspects of the education of the minors, driving schools. The person licenced and/or active as a teacher or an official tester in civic education is an agent of the authoritative government, to the extent of his duties in the implementing of the will of that government. Also, the person thus active in civic education in the public institution is an employee of the government in charge of the institution, in the good faith substance of his civic educational conduct in his job.

As below, the U.S. Constitution forbids governments in the U.S. to promote or sponsor as estimable in itself scholarship as an undertaking or way of life. How-

ever, the governments are free to promote or sponsor scholarship, for their public's satisfactions indifferent to scholarship, which their promoting or sponsoring of scholarship induces.

Scholarship is a distinct, inherently spiritual, and fundamentally rational undertaking or way of life, to which circumstances inspire or enable individuals, in various ways and degrees. Therefore, the community of interacting scholars pondering in their scholarship scholarly subjects, or the subject of scholarship, ("scholarly community"), is inherently a private enclave in the general society; with mores ("scholarly mores") which consist of original elements rightfully important and private to that community, in addition to the mores basic to the general society ("civic mores"). Also, education in scholarship,, e.g., the higher and the professional education, ("scholarly educa-

tion"), as a dialogue between the teacher and the student, as scholars, on scholarly subjects, or on the subject of scholarship, is an affair purely of the scholarly community. Recognizing these facts, the academic freedom doctrine says, in effect, the following: (1) Scholarship is a religion in the meaning of the First Amendment; governments shall not compel or suppress it, or encourage or discourage it. (2) Governments cannot, through any mechanism, in any way, condition, qualify or perturb any affair purely of the scholarly community, e.g., scholarly education. They shall not attempt to do so. (3) The defendant in a controversy purely of the scholarly community is amenable to prosecution only as a private party, only to private parties, only on the basis of the scholarly mores, not merely of the civic mores. Nothing more, nothing less. The respondents' notion that academic freedom

means a freedom of the (state school?) teacher, (as a hierarch of scholarship as a state religion?), from suit by his student is mistaken.

The passage in Epperson v. Arkansas, 393 U.S. 97, at 104 (1968), cited by the respondents, occurs in a statement to the effect that (1) governments have authority over civic education, and have the authority to promote or sponsor scholarly education; (2) they have not any authority over scholarly education. In Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, at 91 (1978), it occurs in a remark, with an allusion to Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 NE 1095 (1913), to the effect that the jurisdiction over a dispute between the public school student and the school authority, arising in their schoolish affairs belongs primarily to the government in charge of the school, if it belongs to

any government; the federal government's jurisdiction definitely does not reach the dispute, where the dispute is beyond the former government's jurisdiction, as in Barnard and Horowitz. In these illustrative cases the public school student sought the government in charge of the school to modify, affect or supersede for his sake the substance of his teacher's scholarly-educational conduct with him. The court said, in effect, that the government lacks jurisdiction to so act, for the academic freedom principles stated above. Thus, the respondents' notion that the state university teacher is a state agent (or ward) in the substance of his scholarly-educational conduct, because the state is, in that area authoritative over him (or obliged to him), is belied, not supported by these authorities.

Evidently, the respondents, and the courts below, do not perceive the imports

of Horowitz. Kouno sees in this case report roughly the following: The plaintiff sued as a subject and ward of the U.S. and the state, but not as a categorically independent and private scholar; suing the teachers as state agents and wards, or state subjects and wards, but not as categorically independent and private scholars; formally appealing to the civic mores, but not the mores unique, important and private to the scholarly community which are the heart of scholarship, and of the dispute. Thus, the plaintiff failed to supply the Court a dispute or the jurisdiction. Also, the plaintiff thus showed that she did not know the meaning of scholarship. Thus, even though the teachers treated the plaintiff irregularly in the school, that is not necessarily wrong, or litigably wrong, for, in her evident lack of scholarship, the plaintiff might have forfeited

her scholarly rights; and, if so, she should have known that. This consideration, too, was pertinent. Thus, the plaintiff failed not because the teachers were state agents in the context of the suit (they were not), not because they were immune to suit or claims by the plaintiff (they were not), and not because she did not convey irregularities on the teachers' part, of type litigable by the scholar student (she conveyed).

In the lack of plainness in the Opinion of the Court Kouno understands the following: Two alternative theories of recovery become incurably repugnant to each other upon certain posture with which the plaintiff commits himself to one. Where the plaintiff has made, or is in the process of making, so repugnant to each other two alternative theories of recovery available to him, and the theory which he pursues is not good while, evidently to

the court, the other theory might be, or would be, good, the court may find in its path a dilemma, in an incompatibility between, on one hand, 'substantial' justice for the plaintiff and, on the other, the maintenance of judicial neutrality or the avoidance of judicial barratry. The district court in the Horowitz case, and the Court which sat in its place in review, faced and responded to such a dilemma.

CONCLUSION

The respondents do not earnestly dispute, for they cannot, the being of the petitioner's questions before the Court, and their importance.

The finer and the more precise merits of the contentions are yet to be presented by the litigants.

Wherefore, this Court should grant the petitioner the writ of certiorari.

Respectfully submitted,

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Petitioner, pro se.